NO. 47763-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHANE A. DELORENZE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COURT
The Honorable David E. Gregerson, Judge
Cause No. 14-1-01224-1

BRIEF OF APPELLANT

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02. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive DeLorenze of his right to a fair trial.

03. The trial court erred in permitting DeLorenze to be represented by counsel who provided ineffective assistance by failing to object to inadmissible evidence of guilt.

04. The trial court erred in permitting DeLorenze to be represented by counsel who provided ineffective assistance by failing to properly object to the prosecutor's closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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[Assignment of Error No. 1].

02. Whether there was sufficient evidence that Ms. Ashley was incapable of consent by reason of being physically helpless or mentally incapacitated?
[Assignment of Error No. 1].

03. Whether DeLorenze was denied his right to a fair trial where the prosecutor engaged in prejudicial misconduct during closing argument by arguing the jury should do its job and find DeLorenze guilty and by disparaging defense counsel?
[Assignment of Error No. 2].

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04. Whether DeLorenze was prejudiced by his counsel's failure to object to inadmissible evidence of guilt and to the prosecutor's closing argument?
[Assignments of Error Nos. 3 and 4].

C. STATEMENT OF THE CASE

01. Procedure

Shane A. DeLorenze was charged by amended information filed in Clark County Superior Court January 15, 2015, with rape in the second degree, contrary to RCW 9A.44.050(1)(b). [CP 2].

Trial to a jury commenced May 19, the Honorable David E. Gregerson presiding. DeLorenze was found guilty, sentenced within his standard range, and timely notice of this appeal followed. [CP 24-40].

02. Trial

On Sunday, June 21, 2014, just after 1:00 in the morning, police were dispatched to the scene of a reported rape at a residence in Clark County. [RP 121-22]. In the upstairs bedroom, Jennifer Ashley, who appeared slightly intoxicated, was located on a bed, without clothes and and sobbing. [RP 123-24, 154]. No wet spots or bodily fluids were detected during a subsequent inspection of the bed sheets "all the way down to the mattress padding." [RP 136-37].

That Saturday evening Ms. Ashley and her husband Eddie celebrated her 30th birthday at home with 15 to 20 friends. [RP 127, 165].

DeLorenze arrived with Ryan Jefferies and Tyler Derricks. [RP 166]. The party was low key: "[t]here wasn't any music playing or anything." [RP 167].

About 12:30 to 1:00, Ms. Ashley left the party and went upstairs to go to bed. [RP 172]. This was at the same time the guests were leaving. [RP 173]. DeLorenze, Jeffries and Derricks had planned on spending the night. [RP 175]. According to Mr. Ashley, after Derricks passed out on the couch [RP 177], he and "Jeffries started talking and I don't remember how (DeLorenze) disappeared from us, like, you know, because we were downstairs, all right." [RP 178]. "And then something alerted us to upstairs. We heard some kind of thump, you know, upstairs." [RP 179].

When Mr. Ashley went to investigate, he found a naked DeLorenze on top of his wife. "[H]e did not have pants on." [RP 180]. "I saw his butt going up and down on top of my wife." [RP 179]. They were on the bed, his wife in the missionary position, legs apart, with DeLorenze in between, thrusting. [RP 179-80]. "I could not see a penis entering a vagina." [RP 205].

> It was kind of a shock, you know. I didn't know - - it wasn't a room that I was planning on walking in to and then I just went, "What the fuck?" I just kind of yelled that and at that point he got up and bolted out of that room like a bat out of hell just to get out of there.

[RP 181]. He slapped his wife a couple of times and told her something to the effect that she had ruined their whole lives. [RP 203].

> And then all of a sudden, it hits her, and she goes, "I was just raped," you know. It's like, "Holy shit." So I called 911.

[RP 183].

Ms. Ashley told the 911 operator that she wasn't sure if she'd been sexually assaulted. "I don't know. I drank a lot." [RP 196]. "Someone was on top of me. I thought it was my husband. My husband stormed in. I had no idea it wasn't him." [RP 196].

Jeffries claimed that when he accompanied Mr. Ashley upstairs, he "saw movement, quick movement," before observing DeLorenze, absent his pants, standing at the foot of Ms. Ashley's bed. [RP 235, 238]. "To me, he seems incoherent and mumbling. He doesn't even seem to know where he's at." [RP 238].

At trial, Ms. Ashley said she had left the party and gone upstairs to go to bed. [RP 307]. She admitted to drinking "a lot." [RP 308]. "I remember thinking I'm going to feel this tomorrow." [RP 308-09]. She recounted how her husband had slapped her awake, saying, "Jennifer, another dude was just inside you." [RP 312]. She never saw anyone other than her husband in the bedroom. [RP 314]. "I felt a pressure leave my body. That's it. And then I still thought it was a dream. My eyes were still

closed." [RP 314-15]. Until her husband's comments, she was unaware anyone had had sex with her, explaining she was "asleep." [RP 346].

Ms. Ashley's blood alcohol level was above the legal limit to drive (.11 grams per 100 millimeters). [RP 277]. No male DNA was detected on the vaginal endocervical swabs taken from Ms. Ashley. [RP 523]. A DNA profile detected on penial swabs taken from DeLorenze contained a mixture consistent with originating from two individuals, a component of which matched Ms. Ashley. [RP 515].

When interviewed at 4:00 the morning of the incident, DeLorenze's repeatedly told the police that he had no recollection of the events. [RP 426, 442, 450, 453-57]. His taped statement was played to the jury. [RP 426-461].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DELORENZE'S CONVICTION FOR RAPE IN THE SECOND DEGREE.

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of

the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

01.1 Insufficient Evidence of Sexual Intercourse

As set forth in the court's to-convict instruction, the State was required to prove beyond a reasonable doubt that DeLorenze "engaged in sexual intercourse with Jennifer Beth Ashley(.)" [CP 21; Court's Instruction 12]. The Court's Instruction 7 defined sexual intercourse:

> Sexual Intercourse means that the sexual organ of the male penetrated the sexual organ of the female and occurs upon any penetration, however slight; or any penetration of the vagina, however slight, by an object, including a body part, when committed on

> one person by another, whether such persons are of the same or opposite sex.

[CP 16; Court's Instruction 7].

During her conversation with the 911 operator right after the incident, Ms. Ashley asserted that she didn't know if she'd been sexually assaulted, let alone the victim of vaginal intercourse. "I don't know. I drank a lot." [RP 196]. An inspection of the bed sheets supports her uncertainty: no evidence of any wet spots or bodily fluids was detected. [RP 136-37]. Mr. Ashley testified that he did "not see a penis entering entering a vagina." [RP 205]. And while he, after roughing up his wife [RP 203], did tell her that "another dude was just inside you [RP 312](,)" no male DNA was found on the vaginal endocervical swabs taken from Ms. Ashley. [RP 523]. Reality—what the physical evidence demonstrates—matters. Given the results of the examination of the vaginal endocervical swabs, it is a fair inference that the source of the DNA profile found on the penial swabs taken from DeLorenze's, a component of which matched Ms. Ashley, was not the result of any penetration of Ms. Ashley's vagina, even more so given that its origin could have been the result of tough DNA,[1] such as contact with Ms. Ashley's knee, her thigh, or the rubbing against her side. As more evidence about the incident

[1] "DNA obtained from skin cells left behind on an item." [RP 517].

comes to light, the argument that there was any penetration of the vagina, however slight, becomes increasingly indefensible, with the result that the State failed to carry burden to prove this element.

01.2 Insufficient Evidence that Jennifer Beth Ashley was Incapable of Consent by Reason of Being Physically Helpless or Mentally Incapacitated

As also set forth in the court's to-convict instruction, the State was required to prove beyond a reasonable doubt that "the sexual intercourse occurred when Jennifer Beth Ashley was incapable of consent by reason of being physically helpless or mentally incapacitated(.)" [CP 21; Court's Instruction 12]. The Court's Instruction 9 defined "mental incapacity" and "physically helpless" as follows:

> Mental incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition if produced by illness, defect, the influence of a substance, or by some other cause.
>
> A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

[CP 18; Court's Instruction 9].

The evidence did not establish that at the time of the incident Ms. Ashley did not understand the nature or consequences of the act or that she was unconscious or unable to communicate her unwillingness. The 911

call is informative. She told the operator that "[s]omeone was on top of me. I thought it was my husband." [RP 196]. She was mistaken. The person on top of her was not her husband. But the point is this, mistaken identity is not "mental incapacity" or "physically helpless," not even close.

01.3 Conclusion

Though an appellate court gives deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of evidence, State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, reviewed denied, 119 Wn.2d 1011 (1992), the evidence presented in this case, based on the record before this court, cannot be found to be sufficient to support the argument that DeLorenze committed the offense for which he was convicted.

02. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT BY ARGUING THE JURY SHOULD DO ITS JOB AND FIND DELORENZE GUILTY AND BY DISPARAGING DEFENSE COUNSEL.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer whose duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial. State v. Huson, 73 Wn.2d

660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where it is established that the prosecutor made improper comments, this court reviews whether those improper statements prejudiced the defendant under various standards of review. State v. Emery, 174 Wn.2d 742, 761, 278 P.3d 653 (2012).

A criminal defendant's right to a fair trial is denied where there is an unsuccessful objection to the prosecutor's improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for` a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor's obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504,

516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

02.1 Duty to Convict

It is misconduct for a prosecutor to argue or imply that that the jury would violate its oath if it disagreed with the State's theory of the evidence. State v. Coleman, 74 Wn. App. 835, 839, 876 P.2d 458 (1994). Trying to exhort or pressure the jury to "do its job" has "no place in the administration of criminal justice" and constitutes misconduct. United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d (1985). This is so because such arguments erroneously convey the message that unless the jury convicts it would violate its oath. "Warnings to a jury about not doing its job [are] considered to be among the most egregious forms of prosecutorial misconduct." State v. Acker, N.J. Super. 351, 356-57, 627 A.2d 170, cert denied, 134 N.J. 485, 634 A.2d 530 (1993). The Coleman court warned prosecutors that it "cannot

emphasize enough the unnecessary risk of reversal that such argument creates." 74 Wn. App. at 841.

In this case, the prosecutor ignored the above admonition by leaving the jury with the following:

> Ladies and Gentleman, the evidence is clear, it's conclusive, it's strong, proof beyond a reasonable doubt the defendant did have sexual intercourse with Jennifer Ashley at a time she was incapable of consent. Please do your job. Find the defendant guilty. (emphasis added)

[RP 617].

This was nothing short of a directive to convict, an implicit call for the jury to "do your job" without reference to its need to consider and weigh the evidence, for it was clear and conclusive and strong. Just do your job. The prosecutor's argument was flagrant and ill-intentioned and of the sort long disparaged by the courts as egregious and improper. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996).

02.2 Disparaging Defense Counsel

It is also misconduct for a prosecutor to impugn the integrity of defense counsel. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.2d 902 (2008). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." State v. Lindsay, 180 Wn.2d

423, 432, 326 P.3d 125 (2014) (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam)).

During rebuttal, over objection,[2] the prosecutor argued:

> And I've listened to their argument. I've listened to their theories. You all heard the same. As we stand here today - - or sit, we're still waiting for a defense theory that makes sense. Everything that Defense has advanced up to this point has been so absurd.
> ....
> It has been so absurd, so far fetched it make no sense whatsoever....

[RP 616].

The prosecutor's argument suggested that defense's closing argument was dishonorable and disgraceful, something that should be considered to be complete nonsense, much like referring to defense's argument as a "crock," which does constitute misconduct. State v. Lindsay, 180 Wn.2d 433-34.

The prosecutor's comment was as improper as it was irrelevant, serving no other purpose than to improperly cast aspirations on defense counsel. It was flagrant and ill-intentioned and had nothing to do with the case, other than to interfere with the jury's unbiased consideration of the evidence and supporting arguments.

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[2] The court overruled defense counsel's objection that the prosecutor was stating his opinion. "Argue reasonable inferences to the jury. Overruled." [RP 616].

02.3 Cumulative Effect of Misconduct

Based on this record, reversal is required, for not only is there a substantial likelihood that the prosecutor's comments affected the jury's verdict, the comments were nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, for they were "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). In deciding whether the conduct warrants reversal, this court considers its prejudicial nature and its cumulative effect. State v. Boehning, 127 Wn. App. at 518.

The State's case, as set forth above, was anything but overwhelming. Was there penetration? Was Ms. Ashley incapable of consent? Close calls on both. And in this context, the prosecutor's misconduct cut the deepest, not only disparaging defense counsel but also misstating the jury's role in deciding the case. The cumulative effect requires reversal and remand.

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03. DELORENZE WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO INADMISSIBLE EVIDENCE OF GUILT AND TO THE PROSECUTOR'S CLOSING ARGUMENT.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

03.1 Opinion Testimony as to Veracity and Guilt

When Officer Jeremy Free's recorded interview with DeLorenze, State's Exhibit 17, was played to the jury, defense counsel posed no objections. [RP 426-461]. During the interview, Free repeatedly offered his opinion as to the veracity of DeLorenze's claim that he didn't recall what had happened:

> I find it hard to believe, and I can almost guarantee that a jury would find that hard to believe. I think the best thing you need to do at this point is to tell the truth on what you know.

[RP 451].

> Because I don't buy that at all. That I don't recall, that doesn't cut it with me. And I guarantee you a jury is not going to buy it....

[RP 452].

> And they're not going to buy your story that I don't remember because if you're able to function to have sex with this girl, you're going to have a memory of it. You're not to the point where you're blacking out and everything if you're able to make those decisions and actually have sex with this girl. So I don't remember, I don't buy it.

[RP 454].

> So I was hoping maybe you would share your side of the story because there's always two sides of the story. I don't necessarily believe your story, what your telling me on you don't remember.

[RP 459].

Officer Free's opinion was clearly inadmissible, for no witness may offer opinion testimony regarding the veracity or lack thereof of another witness because it unfairly prejudices the defendant by invading the province of the jury. See State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). Washington cases have held that "weighing the credibility of a witness is the province of the jury and have not allowed witnesses to express their opinions on whether or not another witness is telling the truth." State v. Casenda-Perez, 61 Wn. App. 354, 360, review denied, 118 Wn.2d 1007 (1991). A law enforcement officer's opinion testimony may be especially prejudicial because it can have "a special aura of reliability." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Moreover, a witness may not testify to his or her opinion as to the guilt of a criminal

defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1997). Such testimony violates the defendant's constitutional right to have the jury make an independent evaluation of the facts. State v. Wilber, 55 Wn. App. 294, 297, 777 P.2d 36 (1989).

Free's assertions amounted to a direct attack on DeLorenze's veracity, giving seed to the inference that he was guilty, even to the point of claiming that the jury would not believe him. DeLorenze had denied that he had any recall of the events. The inference flowing from Free's opinion is unmistakable: DeLorenze is dishonest, he knows know what happened, the jury will not believe him, he is guilty of raping Ms. Ashley.

03.2 Closing Argument

Should this court determine that counsel waived the issue of prosecutorial misconduct by failing to object to the prosecutor's closing argument as previously set forth herein at pages 9-14, then both elements of ineffective assistance of counsel have been established for the reasons argued below.

03.3 Ineffective Assistance of Counsel

The record does not and could not reveal any tactical or strategic reason why trial counsel failed to object to the above inadmissible evidence of guilt that implicated DeLorenze in the

charged offense or by failing to object to the prosecutor's closing argument that both exhorted the jury to "do your job" by finding DeLorenze's guilty and disparaged defense counsel. Had counsel so objected, the trial court would have granted the objection under the law argued herein.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359.

The prejudice here is self-evident and not harmless. As argued above, the State's case was anything but solid, with serious questions relating to the issues of penetration, incapability of consent, and DeLorenze's claim of lack of recall. The inadmissible evidence admitted in this case (Free's opinion as to DeLorenze's veracity or lack thereof) coupled with the prosecutor's misconduct during closing argument left DeLorenze defenseless. Thus, within reasonable probabilities, the trial's outcome could have differed had the inadmissible evidence and assertions during closing argument been excluded.

Counsel's performance was deficient, which was highly prejudicial to DeLorenze, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction and remand for retrial.

E. CONCLUSION

Based on the above, DeLorenze respectfully requests this court to reverse and dismiss his conviction or remand for a new trial.

DATED this 8th day of March 2016.

Respectfully submitted,

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 8th day of March 2016.

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DOYLE LAW OFFICE

March 08, 2016 - 2:01 PM

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